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OFFICE OF GENERAL
COUNSEL

November 14, 2011

By Electronic Mail

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2011-23 (American Crossroads)

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2011-23, a request submitted on behalf of American Crossroads, an "independent expenditure-only committee" seeking the Commission's opinion whether it may "produce and distribute television and/or radio issue advertisements featuring on camera footage (or voice-over, in the case of radio advertisements) of incumbent Members of Congress . . . [,] thematically similar to the incumbent Members' own re-election campaign materials, and [using] phrases or slogans that the Member has previously used"? AOR 2011-23 at 1.

American Crossroads explains: "The purpose of these advertisements . . . would be to improve the public's perception of the featured Member of Congress in advance of the 2012 campaign season." *Id.*¹ American Crossroads further explains: "These advertisements would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement." AOR 2011-23 at 3 (emphasis added).

In short, a political committee seeks the Commission's permission to "fully coordinate[]" ads with candidates, featuring those candidates, echoing the candidates' campaign slogans, in ads that are "thematically similar" to the candidates' own campaign ads, for the purpose of improving voters' "perceptions" of those candidates in the 2012 election—without treating its payments for such ads as coordinated expenditures under federal law. Just to recite this request is to demonstrate the absurdity of it.

The Supreme Court since *Buckley v. Valeo*, 424 U.S. 1 (1976), has recognized the importance of candidate contribution limits to prevent corruption and the appearance of

¹ American Crossroads' claimed intent to run its ads "in advance of" the 2012 campaign season should be disregarded by the Commission. The 2012 campaign season is already well underway.

corruption, and has made clear that “expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse.” *Id.* at 46. For this reason, “such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act” and are subject to FECA’s contribution limits so as to “prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.” *Id.* at 46-47.

According to the *Buckley* Court, it is the “absence of prearrangement and coordination of an expenditure with the candidate” that “not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” *Id.* at 47.

Throughout the decades since *Buckley*, the Court has consistently reiterated this broad view of what constitutes coordination and the potential for corruption presented by coordinated spending. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (“*Colorado I*”), the Supreme Court held that a political party ad aired prior to a candidate’s nomination would not be treated as coordinated only because the ad was developed “independently and not pursuant to any general or particular understanding with a candidate” *Id.* at 614 (emphasis added). The Court stressed that “the constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure.” *Id.* at 617.

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (“*Colorado II*”), the Court recognized that there is a “functional, not a formal” definition of contributions, which includes expenditures made in coordination with a candidate. *Id.* at 443 (emphasis added). Of particular importance, the Court noted that independent expenditures are only those “without any candidate’s approval (or wink or nod)” *Id.* at 442 (emphasis added).

In *McConnell v. FEC*, 540 U.S. 93, 221-22 (2003), the Court noted that “expenditures made after a ‘wink or nod’ often will be as useful to the candidate as cash.” And most recently, in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Court once again repeated with approval its conclusion in *Buckley* that “prearrangement and coordination” presents the “danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47).

The Supreme Court’s concerns about the threat of corruption posed by coordinated spending and the critical need for effective regulation of such activity was recognized as obvious by the district and appellate courts in the *Shays I* and *Shays III* lawsuits—lawsuits in which all four decisions invalidated the Commission’s coordination regulation at 11 C.F.R. § 109.21 for its failure to “rationally separate[] election-related advocacy from other activity falling outside FECA’s expenditure definition” and to effectively regulate the former. *See, e.g., Shays v. FEC*, 414 F.3d 76, 102 (D.C. Cir. 2005) (“*Shays I Appeal*”), *aff’d* 337 F. Supp. 2d 28 (D.D.C. 2004) (“*Shays I District*”); *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008) (“*Shays III Appeal*”), *aff’d* 508 F. Supp. 2d 10 (D.D.C. 2007) (“*Shays III District*”).

American Crossroads' proposal to run ads that it boldly concedes are to be "fully coordinated with incumbent Members of Congress facing re-election in 2012" and yet run these ads as "uncoordinated ads" under the campaign finance laws stands in stark conflict with the interpretation of federal restrictions on coordination made by both the Supreme Court and by the *Shays* courts.

American Crossroads' proposal also contravenes the plain language of federal statutes and regulations on coordination. Federal law defines "expenditure" to include any payment "made by any person for the purpose of influencing any election for Federal office[.]" 2 U.S.C. § 431(9)(A)(i). This definition was amended post-*Buckley* to provide that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). This critically-important statutory standard is implemented by the Commission's regulations at section 109.20, which largely mirrors the statutory language, and at section 109.21, which more narrowly defines "coordinated communication." See 11 C.F.R. §§ 109.20 and 109.21.

Clearly, American Crossroads' proposed payments for ads "fully coordinated" with candidates to "improve the public's perception" of those featured candidates in the 2012 campaign are "for the purpose of influencing" the candidates' election to federal office. American Crossroads does not even bother to suggest the contrary. Accordingly, the ads must be treated by the Commission as impermissible contributions to such candidates under 2 U.S.C. §§ 431(9)(A)(i), 441a(a)(7)(B)(i) and 11 C.F.R. §§ 109.21 or 109.20.

American Crossroads concedes that its proposed ads meet the "conduct" prong of the Commission's "coordinated communication" regulation at 11 C.F.R. § 109.21(d)—*i.e.*, that the ads are "fully coordinated" with the candidate who is promoted in the ads—but argues that its ads would not meet the "content" prong of the rule. AOR 2011-23 at 3-4. This is so, American Crossroads argues, because its ads are to be run outside the 90-day period before the election, do not constitute "electioneering communications," and, most importantly, "would not contain express advocacy or the functional equivalent of express advocacy." *Id.* at 3.

For the reasons set forth below, the Commission should find that the ads proposed by American Crossroads do contain the functional equivalent of express advocacy, and therefore meet the content standard of section 109.21(c)(5) of the Commission's regulations. Given the concession by American Crossroads that the ads are "fully coordinated" and meet the conduct standards of section 109.21(d), they accordingly are "coordinated communications" and are subject to the contribution limits in the law.

The history of efforts by the courts and Congress to effectively regulate coordination, as well as the Commission's repeated failure to promulgate regulations to properly do so, is detailed in an Appendix to these comments. The Commission's most recent amendments to its coordination rules in 2010, weak and flawed as those amendments are, nevertheless do capture the ads proposed by American Crossroads. Any conclusion by the Commission to the contrary is proof positive that the Commission's 2010 coordination rule is invalid under *Shays III* and therefore cannot be relied on by either American Crossroads or the FEC because it fails to

“rationally separate[] election-related advocacy from other activity falling outside FECA’s expenditure definition” and to effectively regulate the former. *Shays III Appeal*, 528 F.3d at 925.

I. American Crossroads’ Proposed Ads Constitute Coordinated Expenditures and Are Thus Impermissible Under Federal Law.

A. American Crossroads’ Proposed Ads Are the “Functional Equivalent” of Express Advocacy and Meet the Content Standard at 11 C.F.R. § 109.21(c)(5).

American Crossroads asks the Commission if it may “produce and distribute television and/or radio issue advertisements featuring on camera footage (or voice-over, in the case of radio advertisements) of incumbent Members of Congress . . . [,] thematically similar to the incumbent Members’ own re-election campaign materials, and [using] phrases or slogans that the Member has previously used”? AOR 2011-23 at 1.

American Crossroads explains: “The purpose of these advertisements . . . would be to improve the public’s perception of the featured Member of Congress in advance of the 2012 campaign season.” *Id.* American Crossroads explains further: “These advertisements would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement.” AOR 2011-23 at 3 (emphasis added).

American Crossroads “concedes that each advertisement would: (1) be paid for by a person other than the candidate or the candidate’s authorized committee; and (2) satisfy one or more of the ‘request or suggestion,’ ‘material involvement,’ or ‘substantial discussion’ conduct standards[,]” but claims that “none of the ‘content’ standards set forth at 11 C.F.R. § 109.21(c) would be satisfied.” AOR 2011-23 at 3-4.

This is incorrect. The content standard at section 109.21(c)(5) is met by a “public communication . . . that is the functional equivalent of express advocacy.” The rule states that “a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” 11 C.F.R. § 109.21(c)(5). American Crossroads’ proposed ads clearly meet this standard—they are susceptible of no reasonable interpretation other than as an appeal to vote for the featured candidates with whom the ads are coordinated.

The Commission stated in its Explanation and Justification for section 109.21(c)(5) that the “functional equivalent” standard was adopted from Chief Justice Roberts’ controlling opinion in *FEC v. Wisconsin Right to Life (WRTL)*, 551 U.S. 449 (2007), later applied by the Court in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). 75 Fed. Reg. at 55952. The Commission explained: “In applying the test, the Commission will follow the Supreme Court’s reasoning and application of the test to the communications at issue in *WRTL* and *Citizens United*.” *Id.* Chief Justice Roberts, in his controlling opinion in *WRTL*, found that the three ads at issue in the case were not the functional equivalent of express advocacy in part because “their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on

the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.” *Id.* at 55953 (citing *WRTL*, 551 U.S. at 470).

Unlike the ads at issue in *WRTL*, which were deemed not the functional equivalent of express advocacy in part because their content was consistent with a genuine issue and—they took a position on an issue, exhorted the public to adopt that position, and urged the public to contact public officials with respect to the matter—American Crossroads’ proposed ads do not exhort the public to adopt a position on any issue, nor do they urge the public to contact public officials with respect to that issue.

Furthermore, unlike the “issue ads” in *WRTL*, which criticized the only candidates named in the ads and did not feature those candidates as speakers and participants in the ads, American Crossroads’ proposed ads feature as a speaker the candidate with whom the ads are coordinated.

American Crossroads’ proposed ads compare candidates’ politics, favorably characterizing the candidate with whom the ad is coordinated, unfavorably characterizing that candidate’s electoral opponents and ending with a promise by the candidate with whom the ad is coordinated. The public is neither exhorted to adopt a position on an issue, nor urged to contact public officials.

American Crossroads’ proposed ads are closer to the ad at issue in *Citizens United*. Like the ad deemed by the Supreme Court in *Citizens United* to be the “functional equivalent of express advocacy,” the ad at issue here “would be understood by most viewers” as promoting the election of the candidate in the ad, 130 S. Ct. at 890, and is “in essence,” *id.*, a campaign-related ad that urges voters to support the candidate’s election. Like the *Citizens United* ad, “there is little doubt that the thesis” of the ad, *id.*, is to persuade viewers and voters to support the election of the candidate who appears in the ad.

The idea that an ad funded by a political committee, starring a Member of Congress running for re-election who assists in the production of the ad, for the purpose of improving “the public’s perception of the Member of Congress” is not a coordinated candidate ad is absurd.

Of course, the fact that American Crossroads’ proposed ads are candidate campaign ads is not surprising. American Crossroads is a registered political committee, which, by definition, has the major purpose of influencing federal elections. *See, e.g.,* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (“[O]nly organizations whose ‘major purpose’ is the nomination or election of a Federal candidate can be considered ‘political committees’ under the Act.”). “Expenditures of . . . ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” *Buckley*, 424 U.S. at 79 (emphasis added).

The sole legitimate purpose of the Commission’s “coordinated communication” content standards—as recognized by the courts in *Shays I* and *III* and by the Commission itself—is to “rationally separate[] election-related advocacy from other activity falling outside FECA’s expenditure definition.” *Shays I Appeal*, 414 F.3d at 102; *Shays III Appeal*, 528 F.3d at 925. The Commission has explained: “The purpose of the content prong is to ‘ensure that the

coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a Federal election, and therefore are not 'expenditures' subject to regulation under the Act." Final Rules and Explanation and Justification for Coordinated Communications, 71 Fed. Reg. 33190, 33191 (June 8, 2006) (emphasis added).

American Crossroads clearly states that the purpose of its proposed ads is to "improve the public's perception" of the featured candidate for the "2012 campaign season." In other words, the purpose of the ads is to influence the 2012 election. FECA's "expenditure" definition includes all payments made for the purpose of influencing a federal election. American Crossroads' payments for its proposed ads fall squarely within, not outside, this definition.

As detailed in the Appendix, pp. A-7 through A-16, The *Shays I* circuit court invalidated the Commission's 2002-03 coordination rule, explaining that the Commission must establish that its rule "rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition[.]" and that the record before the court provided "no assurance that the FEC's standard does not permit substantial coordinated expenditure[s]." *Shays I Appeal* 414 F.3d at 102 (internal citations and quotation marks omitted). The court warned the Commission that "if it draws the line in the wrong place, its action will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration." *Id.*

The *Shays III* circuit court then struck down the Commission's 2006 coordination rule and began its decision by noting that in 2002 "Congress passed [BCRA] . . . in an effort to rid American politics of two perceived evils: the corrupting influence of large, unregulated donations called 'soft money,' and the use of 'issue ads' purportedly aimed at influencing people's policy views but actually directed at swaying their views of candidates." *Shays III Appeal*, 528 F.3d at 916 (internal citation omitted) (emphasis added). The *Shays III* circuit court reminded the Commission that it had been under court order to promulgate a rule that "rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition[.]" *Id.* at 925.

The *Shays III* circuit court continued: "Here the Commission failed to show that its rule rationally separates election-related advocacy from other speech, for many of the ads its rule leaves unregulated are plainly intended to 'influenc[e] an [] election for Federal office.'" *Id.* at 926. The court concluded with incredulity:

Finally, the FEC assures us that we have no reason to worry about lax regulation outside the 90/120-day windows because it has received very few complaints alleging that candidates are currently coordinating expenditures with outside groups before the windows, and there is no evidence that candidates will begin coordinating with outside groups if we uphold the regulation. This argument flies in the face of common sense. Of course the FEC hasn't received many complaints: the challenged rule allows unlimited coordination so long as the resulting advertisements omit express advocacy. . . . Moreover, the Commission's prediction about what will happen in the future disregards everything Congress, the Supreme Court, and this court have said about campaign finance regulation. In passing BCRA, Congress found that ads funded with soft

money “were often actually coordinated with, and controlled by, the campaigns.” In *McConnell*, the Supreme Court said, “[m]oney, like water, will always find an outlet,” and BCRA reflects “the hard lesson of circumvention” Congress has learned from “the entire history of campaign finance regulation[.]” And in *Shays II*, we said, “if regulatory safe harbors permit what BCRA bans, we have no doubt that savvy campaign operators will exploit them to the hilt, reopening the very soft money floodgates BCRA aimed to close.” Common sense requires the same conclusion here. Under the present rules, any lawyer worth her salt, if asked by an organization how to influence a federal candidate’s election, would undoubtedly point to the possibility of coordinating pre-window expenditures. The FEC’s claim that no one will take advantage of the enormous loophole it has created ignores both history and human nature.

Id. at 927-28 (internal citations omitted) (emphasis added).

The Commission responded to the *Shays III* circuit court decision by adding the “functional equivalent of express advocacy” to its content standards at 11 C.F.R. § 109.21(c)(5); see also Coordinated Communications, Final Rules and Explanation and Justification, 75 Fed. Reg. 55947 (Sept. 15, 2010).

A conclusion by the Commission that American Crossroads’ proposed ads do not meet the “functional equivalent” content standard at section 109.21(c)(5) would “fl[y] in the face of common sense” and render correct the *Shays III* circuit court’s estimation regarding the Commission’s ignorance with respect to “both history and human nature.” *Shays III Appeal*, 528 F.3d at 928.

Further, a conclusion by the Commission that American Crossroads’ proposed ads do not fall within the 2010 coordination rule—the Commission’s response to the *Shays III* court order to promulgate a rule that “rationally separates” election-related advocacy from other speech—would be proof positive that the 2010 coordination rule is invalid under *Shays III*. Under these circumstances, neither American Crossroads nor the FEC can rely on this invalid regulation as a basis for permitting American Crossroads’ proposed activities to occur.

For the above-stated reasons, the Commission should advise American Crossroads that its proposed ads are the “functional equivalent” of express advocacy and thus meet the content standard at section 109.21(c)(5). Consequently, the Commission should find that payments by American Crossroads to produce and distribute its proposed ads would constitute illegal “coordinated communications” under section 109.21.

B. American Crossroads’ Proposed Ads are “Coordinated” Within the Meaning of 11 C.F.R. § 109.20.

American Crossroads asks: “If the planned advertisements are not ‘coordinated communications’ under 11 C.F.R. § 109.21, would the Commission alternatively treat these advertisements as in-kind contributions from American Crossroads to the featured incumbent Member of Congress/candidate pursuant to 11 C.F.R. § 109.20(b)?” The Commission should

answer this question in the affirmative. American Crossroads' proposed ads are clearly "coordinated" within the meaning of section 109.20.

As noted above, federal law defines "expenditure" to include any payment "made by any person for the purpose of influencing any election for Federal office[,]" 2 U.S.C. § 431(9)(A)(i), and provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). This statutory standard is implemented not only by 11 C.F.R. § 109.21, as discussed above, but also by 11 C.F.R. § 109.20.

Section 109.20(a) mirrors section 441a(a)(7)(B)(i), stating: "Coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." Section 109.20(b) provides:

Any expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee, unless otherwise exempted under 11 CFR part 100, subparts C or E.

American Crossroads admittedly intends to make payments for the purpose of influencing the 2012 elections—*i.e.*, "expenditures"—and further intends to make those expenditures in cooperation, consultation and concert with, or at the request or suggestion of, federal candidates. Therefore, even if the Commission nonsensically concludes such coordinated expenditures by American Crossroads do not constitute "coordinated communications" under 11 C.F.R. § 109.21, it still must conclude that such coordinated expenditures are "in-kind contribution[s] to . . . the candidate[s] . . . with whom . . . [they are] coordinated" under section 109.20.

The Commission should find that as a self-identified "independent expenditure-only committee," American Crossroads is prohibited from making such in-kind contributions.

II. If the Commission Incorrectly Concludes that American Crossroads May Produce and Distribute Its Proposed Ads, American Crossroads Will Be Limited In Its Ability to Make Subsequent "Independent Expenditures."

American Crossroads asks:

If the Commission concludes that American Crossroads may produce and distribute the advertisements described in Question #1 or Question #2, . . . [w]ould producing and distributing such advertisements in any way limit the ability of American Crossroads to subsequently produce and distribute an

independent expenditure in support of the same featured . . . candidate, or in opposition to an opponent of that individual.

AOR 2011-23 at 5-6. American Crossroads elaborates:

For example, if the . . . federal candidate was materially involved in producing and distributing the advertisements described in Question #1 and Question #2, . . . would that prior material involvement mean that the [candidate] is also materially involved in any subsequent expenditure if American Crossroads relies on and uses the same information previously learned from the [candidate]

Id. at 6 (emphasis added).

In the event that the Commission improperly refuses to enforce federal statutes and regulations that prohibit American Crossroads from producing and distributing its proposed coordinated ads and, instead, permits this farce of allowing coordinated non-coordinated ads, the Commission must nevertheless advise American Crossroads that its proposed course of action would result in the “conduct” prong of 11 C.F.R. § 109.21(d) being met for any subsequent ads for which it “relies on and uses the same information previously learned from” the candidate where that information is “material to the creation, production, or distribution of the communication.” 11 C.F.R. § 109.21(d)(3). That conclusion is required by the straight-forward application of the language on the face of the regulation. Consequently, any subsequent ads that meet the “content” prong of section 109.21(c) would constitute prohibited “coordinated communications.”

We appreciate the opportunity to provide these comments to you.

Sincerely,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

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Copy to: Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission

APPENDIX

History of Federal Campaign Law Regulation of “Coordination”

I. "Coordination" in the Pre-BCRA Era.

The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), distinguished for constitutional purposes between limitations on "contributions" to a candidate's campaign, and limitations on "expenditures" by an independent outside spender in support of, or opposition to, a candidate's campaign. *Buckley* also recognized that, to be effective, any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47. Coordinated expenditures thus amount, in practical effect, to "disguised contributions" and should be viewed that way by the Commission.

Buckley emphasized the difference between expenditures "made totally independently of the candidate and his campaign," *id.* at 47 (emphasis added), and "coordinated expenditures," construing the contribution limits in the Federal Election Campaign Act ("FECA") to include not only contributions made directly to a candidate, political party, or campaign committee, but also "all expenditures placed in cooperation with or with the consent of a candidate, his agents or an authorized committee of the candidate . . ." *Id.* at 46-47 n.53 (emphasis added); *see also id.* at 78. The Court noted, "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* (emphasis added).

The 1976 amendments to the FECA codified *Buckley's* treatment of coordinated expenditures. FECA was amended to provide that an expenditure made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." Pub. L. No. 94-283, § 112, 90 Stat. 475 (codified at 2 U.S.C. § 441a(a)(7)(B)(i)).

Under the rules promulgated by the FEC in 1980 to implement these statutory provisions, an expenditure was not considered "independent" if it was made pursuant to:

[A]ny arrangement, coordination or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication. An expenditure will be presumed to be so made when it is—

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agents.

11 C.F.R. § 109.1(b) (1980).

The broad language of *Buckley* regarding coordination was echoed in subsequent Supreme Court decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (“*Colorado I*”), the Supreme Court held that a political party ad aired prior to a candidate’s nomination would not be treated as coordinated because the ad was developed “independently and not pursuant to any general or particular understanding with a candidate . . .” *Id.* at 614 (emphasis added). The Court stressed that “the constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure.” *Id.* at 617.

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (“*Colorado II*”), the Court—again in the context of party spending—underscored “the good sense of recognizing the distinction between independence and coordination.” *Id.* at 447. The Court recognized that there is a “functional, not a formal” definition of contributions, which includes expenditures made in coordination with a candidate. *Id.* at 443. Cf. particular importance, the Court noted that independent expenditures are only those “without any candidate’s approval (or wink or nod) . . .” *Id.* at 442. The Court stated:

There is no significant functional difference between a party’s coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party’s right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits.

Id. at 464 (emphasis added).²

The standard for conduct that constitutes coordination was narrowed by a district court in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). There, in the view of the court, the FEC took the position that “any consultation between a potential spender and a federal candidate’s campaign organization about the candidate’s plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election ‘coordinated,’ i.e., contributions.” *Id.* at 89. The district court found the FEC’s treatment of such expenditures to be constitutionally overbroad because “the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.” *Id.* at 91.

Instead, the district court formulated its own, “narrowly tailored” definition of coordination, providing that coordination could be found where (1) an expenditure was “requested or suggested” by a candidate, or (2) where there had been “substantial discussion or negotiation between the campaign and the spender over” a communication’s contents, timing,

² The Court went on to hold that limitations on coordinated party spending are subject to “the same scrutiny we have applied to political actors, that is, scrutiny appropriate for a contribution limit . . .” Applying that scrutiny, the Court concluded that “a party’s coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits.” *Id.* at 465.

audience or the like, "such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure" *Id.* at 92.

Although the court's analysis in the *Christian Coalition* case has serious flaws,³ even the narrow coordination standard articulated by the *Christian Coalition* court would encompass ads of the sort proposed by American Crossroads here.⁴ Aware that its decision would be controversial, the court invited the FEC to appeal, *id.* at 98 (finding that there are questions of law "as to which there is substantial ground for difference of opinion and . . . an immediate appeal . . . may materially advance the ultimate termination of the litigation"), and the Commission's counsel recommended it do so. Yet a majority of the Commission refused to appeal, leaving in place the district court decision. As Commissioners Thomas and McDonald pointed out in dissenting from this decision, "Not only is the district court's narrow and restrictive standard of coordination found nowhere in the [FECA] and Commission's regulations, but also it runs directly contrary to *Buckley* where the Supreme Court considered independent expenditures as those made 'totally independent of the candidate and his campaign.'"⁵

³ The court formulated such a narrow definition of coordination that it failed to encompass even the extensive discussions about strategic matters between campaign officials and Christian Coalition leaders that took place in that case. Further, the court's standard would allow virtually unfettered communication between candidates and outside groups, so long as one side simply provides information to the other without eliciting a response. Yet that information could plainly be sufficient for an outside spender to craft an ad that would be of great value to the candidate.

⁴ The court in *Christian Coalition* did definitively reject the argument that the coordination rules should apply only to ads that contain express advocacy. Judge Green said such a limitation on the scope of coordination:

[W]ould misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions. Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat.

For example, expensive, gauzy candidate profiles prepared for television broadcast or use at a national political convention, which may then be broadcast, would be paid for from corporate or union treasury funds. Such payment would be every bit as beneficial to the candidate as a cash contribution of equal magnitude and would equally raise the potential for corruption. Even more pernicious would be the opportunity to launch coordinated attack advertisements, through which a candidate could spread a negative message about her opponent, at corporate or union expense, without being held accountable for negative campaigning Allowing such coordinated expenditures would frustrate both the anti-corruption and disclosure goals of the Act.

52 F. Supp. 2d at 88 (citations omitted).

⁵ See Statement for the Record of Commissioners Thomas and McDonald in *Federal Election Commission v. Christian Coalition* (Dec. 20, 1999).

Having failed to appeal the district court's controversial decision, the Commission then embraced it by repealing its longstanding coordination regulations and codifying a version of the court's standard into new rules. See 65 Fed. Reg. 76138 (Dec. 6, 2000); see also 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23. The new rules, however, were even more restrictive than the district court's opinion. Although the court nowhere held that an actual "agreement or collaboration" was necessary to find coordination, the new regulations adopted this standard, permitting a finding of coordination only where there have been "substantial discussions or negotiations between the spender and the candidate ... the result of which is collaboration or agreement." 11 C.F.R. § 100.23(c)(2)(iii).

II. "Coordination" Under BCRA and McConnell.

Congress dealt with the *Christian Coalition* standard for coordination, and the Commission's regulation embracing it, in the Bipartisan Campaign Reform Act of 2002 (BCRA). Section 214 of BCRA repealed the FEC's controversial 2000 coordination rule and directed the FEC to promulgate new coordination rules that do not require "agreement or formal collaboration" before the FEC can conclude that an expenditure is coordinated. Senator Feingold explained the intent behind this provision:

The concept of "coordination" has been part of Federal campaign finance law since *Buckley v. Valeo*. It is a common-sense concept recognizing that when outside groups coordinate their spending on behalf of a candidate with a candidate or a party, such spending is indistinguishable from a direct contribution to that candidate or party. . . . An effective restriction on outside groups coordinating their campaign-related activities with federal candidates and their political parties is needed to prevent circumvention of the campaign finance laws. . . .

Absent a meaningful standard for what constitutes coordination, the soft money ban in the bill would be seriously undermined. In the place of outside special interests donating six figure checks to the national parties to be spent on Federal elections, these entities could simply work in tandem with the parties and Federal candidates to spend their own treasury funds—soft money—on federal electioneering activities. This would fly in the face of one of the main purposes of the bill to get national parties and Federal candidates out of the business of raising and spending soft money donations. . . .

This current FEC regulation fails to cover a range of de facto and informal coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill. . . . To remedy this problem, the bill requires the FEC to reexamine the coordination issue and promulgate new coordination rules. These rules need to make more sense in the light of real life campaign practices than do the current regulations.

148 Cong. Rec. S2144-45 (daily ed. March 20, 2002) (emphasis added). Senator McCain elaborated on the intent of Section 214:

It is important for the Commission's new regulations to ensure that actual "coordination" is captured by the new regulations. . . . Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill. The FEC is required to issue a new regulation, and everyone who has an interest in the outcome of that rulemaking will be able to participate in it, and appeal the FEC's decision to the courts if they believe that is necessary.

Id. at S2145 (daily ed. March 20, 2002) (emphasis added).

Section 214 of BCRA was challenged on First Amendment grounds in *McConnell v. FEC*, 540 U.S. 93, 219-23 (2003). The Court began its analysis by noting:

Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are controlled by or coordinated with the candidate and his campaign may be treated as indirect contributions subject to FECA's source and amount limitations. Thus, FECA § 315(a)(7)(B)(i) long has provided that expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.

McConnell, 540 U.S. at 219 (internal citations and quotation marks omitted) (quoting *Buckley*, 424 U.S. at 46 and 2 U.S.C. § 441a(a)(7)(B)(i)).

The *McConnell* plaintiffs argued that BCRA Section 214 and the mandate that the Commission issue new regulations on coordination were "overbroad and unconstitutionally vague." *McConnell*, 540 U.S. at 220. The Court rejected this challenge and upheld the law, explaining:

[T]he rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. By contrast, expenditures made after a "wink or nod" often will be as useful to the candidate as cash. For that reason, Congress has always treated expenditures made "at the request or suggestion of" a candidate as coordinated.

McConnell, 540 U.S. at 221-22 (internal citations and quotation marks omitted) (quoting *Colorado II*, 533 U.S. at 446) (emphasis added).

The *McConnell* Court further held that "FECA's definition of coordination gives fair notice to those to whom [it] is directed and is not unconstitutionally vague." *Id.* at 223 (internal citation and quotation marks omitted) (quoting *Am. Comm'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).

Consequently, the Commission was required to undertake a new rulemaking under a statutory mandate that it rewrite its wholly ineffective coordination rules.

III. 2002 Rulemaking and *Shays I* Invalidation of First Post-BCRA "Coordination" Rule.

Remarkably, the Commission's track record regarding coordination regulation is even worse post-BCRA than it was prior to enactment of the BCRA mandate that the agency rewrite its coordination rules.

In September 2002, the Commission launched a rulemaking regarding "Coordinated and Independent Expenditures" as required by BCRA. See NPRM 2002-16, 67 Fed. Reg. 60042 (Sept. 24, 2002). For the first time, the Commission proposed content standards to define, in part, what constitutes a "coordinated communication." See 11 C.F.R. § 109.21(c). Prior to this, the Commission's regulations had set forth no separate "content" test for a coordinated communication; rather the regulatory language addressed only the "conduct" that constituted coordinated activity. Thus, prior to 2002, the Commission's regulations were silent as to what "content" a communication must contain in order to be treated (if coordinated) as an in-kind contribution.

The statutory provision on coordination, 2 U.S.C. § 441a(a)(7), of course, applies to "expenditures" made by a person in cooperation, consultation or concert with a candidate. The Commission generally implemented this statutory rule by reference to whether the spending at issue was an "expenditure," *i.e.*, whether it was "for the purpose of influencing" an election. See, *e.g.*, Ad. Ops. 1982-56 (applying standard of whether communication has a "purpose to influence the candidate's election"); 1983-12 (applying standard of whether communications "are designed to influence the viewers' choices in an election"); 1988-22 (applying standard of whether communication is in "an election-related context").

In the 2002 NPRM, the Commission sought to narrow the statutory definition of "expenditure," for purposes of the coordination rule, to four proposed content standards that would define which communications could potentially be regulated as coordinated expenditures. These were: (1) an "electioneering communication"; (2) republished campaign materials; (3) express advocacy; and (4) a "public communication," as defined in 11 C.F.R. § 100.26, made within 120 days of an election, targeted to the identified candidate's voters, and including express statements about the candidate's party affiliation, views on an issue, character, or qualifications for office. See 67 Fed. Reg. at 60065 (proposed alternative "C" for 11 C.F.R. § 109.21(c)(4)) (emphasis added).

At a meeting in December, 2002 to consider its final rule, Commissioner Thomas proposed an amendment that would have eliminated the 120-day period, stating in a memo to the Commission:

As I indicated earlier, I am opposed to an approach in the coordination rulemaking whereby communications outside certain timeframes can fully escape

any coordination analysis. In my view, the Commission would thereby be making coordinated communications legal that heretofore have been clearly illegal. This approach would sanction hard hitting 'issue ads' paid for by a person without any limit whatsoever, even if the benefiting candidate produced the ad, selected the media to be used, and picked the precise time and place for the ad to run! Imagine the storied Yellowtail ad . . . run nonstop at the behest of an opponent from the date of the primary in an early primary state through early July, or run nonstop from January through early May in a late primary state. This goes even beyond the misguided *Christian Coalition* analysis, and certainly runs counter to the intent behind the BCRA provisions that voided the Commission's regulations because they were too porous. It would allow the worst of the present 'issue ad' problems, and compound it by allowing full-scale coordination with the benefiting candidates.⁶

Ultimately, the Commission adopted the 120-day rule set forth in the NPRM and the rule was immediately challenged by the principal House sponsors of BCRA in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I District*"). As explained by the district court in *Shays I District*:

Plaintiffs object[ed] to the fact that under this regulation, unless the communication constitutes "express advocacy" or is a republication of a candidate's own materials, the regulation only bars coordinated communications within 120 days of an election, primary or convention. They contend[ed] that under the plain language of the new rules, a candidate will now be able to help create an advertisement touting his virtues or attacking his opponent's, and then persuade a corporation or union to sponsor it using treasury funds, so long as the advertisement is run more than 120 days before any primary, convention, or general election and avoids any "express advocacy" or republication of campaign materials.

337 F. Supp. 2d at 57-58 (footnotes and internal citations omitted). The court noted that the FEC did not dispute this interpretation of the regulations and itself described the rule as a "safe harbor" for communications distributed more than 120 days before an election. *Id.* at 58.

The district court found that the regulation "unduly compromises" the Act:

[I]t has been a tenet of campaign finance law since *Buckley* that FECA, in an effort to prevent circumvention of campaign finance regulations, treats expenditures coordinated with candidates or political parties as contributions to those with whom the expenditures were coordinated. The basic premise of

⁶ Commissioner Scott E. Thomas, FEC Agenda Document No. 02-90-A, 1 (Agenda Item for the Meeting of Dec. 5, 2002) (emphasis added), available at <http://www.fec.gov/agenda/agendas2002/mtgdoc02-90a.pdf>. Commissioner Thomas' motion to amend the draft final rule and eliminate the 120-day period failed by a vote of 2-4. See Minutes of an Open Meeting of the Federal Election Commission December 5, 2002, 6 (approved Dec. 18, 2002), available at <http://www.fec.gov/agenda/agendas2002/approve02-96.pdf>.

coordinated expenditure restrictions is that if political campaigns and outside entities are able to coordinate the outside entity's political expenditures, then the campaign finance contribution and expenditure regulations could be eviscerated.

Id. at 62 (internal citation omitted). The court explained further:

FECA, in an effort to prevent circumvention, provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i); *see also id.* § 441a(a)(7)(B)(ii) (same for political parties). BCRA Section 214 did nothing to change this requirement; it merely ordered the FEC to promulgate new regulations regarding coordinated communications, and provided some guidance. Nor did Congress evince any intent to qualify the reach of this provision of FECA, or to exclude from its reach any particular type of "coordination." Such a move would run counter to the basic notion that a coordinated expenditure, by virtue of its coordination (not its content), is valuable to the political entity with which it is coordinated.

Id. at 62–63 (emphasis added).

Citing the legislative history of section 214 of BCRA, the court said: "Clearly, the statements by Senators McCain and Feingold make clear that the purpose of passing Section 214 of BCRA was not to exempt certain acts of coordination, but rather to enlarge the concept of what constitutes 'coordination' under campaign finance law." *Id.* at 64. The *Shays I* district court concluded:

[P]ursuant to step two of the *Chevron* analysis, the FEC's exclusion of coordinated communications made more than 120 days before a political convention, general or primary election . . . undercuts FECA's statutory purposes and therefore these aspects of the regulations are entitled to no deference. A communication that is coordinated with a candidate or political party has value to the political actor. To exclude certain types of communications regardless of whether or not they are coordinated would create an immense loophole that would facilitate the circumvention of the Act's contribution limits, thereby creating "the potential for gross abuse." *Orloski*, 795 F.2d at 165. The FEC's regulation therefore is "not a reasonable accommodation under the Act," *Orloski*, 795 F.2d at 164 (internal quotation marks omitted), and fails *Chevron* step two.

Id. at 64–65 (emphasis added).

The Commission appealed the district court's decision with regard to, *inter alia*, the 120-day coordination content rule to the D.C. Circuit Court of Appeals. *See Shays v. FEC*, 414 F.3d 76, 97–102 (D.C. Cir. 2005) ("*Shays I Appeal*"). Like the district court, the D.C. Circuit began its analysis by acknowledging that "FECA has long restricted coordination of election-related spending between campaigns and outside groups." *Id.* at 97. The reason for such restrictions,

according to the circuit court, “is obvious.” *Id.* The court explained: “Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly—say, paying for a TV ad or printing and distributing posters.” *Id.*

The court noted that plaintiffs Shays and Meehan argued that the “limitation on the rule’s coverage outside the 120-day window offers politicians and their supporters an unreasonably generous safe harbor.” *Id.* at 98. The court offered several examples to illustrate the plaintiffs’ concerns:

Under the new rules, more than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, “Why don’t you run some ads about my record on tax cuts?” The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the “magic words” of express advocacy—“vote for,” “vote against,” “elect,” and so forth—the ads won’t qualify as contributions subject to FECA. Ads stating “Congressman X voted 85 times to lower your taxes” or “tell candidate Y your family can’t pay the government more” are just fine.

Id. at 98 (emphasis added). The *Shays I* circuit court noted that the district court had found the coordination regulations invalid and it reached the same result, but did so “for slightly different reasons.” *Id.* The circuit court found it “hard to imagine that Representatives and Senators voting for BCRA would have expected regulations like [those adopted by the Commission].” *Id.* at 98–99. The circuit court explained:

Although Congress abrogated the FEC’s old “collaboration or agreement” standard, the new rule permits significant categories of expression—e.g., non-express advocacy more than 120 days before an election—even where formal collaboration or agreement occurs. And while BCRA’s “electioneering communication” provisions . . . disavow the “express advocacy” test—a standard *McConnell* describes as “functionally meaningless”—the FEC has resurrected that standard here, allowing unrestricted collaboration outside the 120 days so long as the communication’s paymasters avoid magic words and redistribution.

Id. at 99 (internal citation omitted).

Nevertheless, given the “lack of guidance” from Congress in the statute, the court declined to rule that “BCRA clearly forecloses the FEC’s approach.” *Id.* Instead, the court expressed its belief that the FEC could construe FECA “as leaving space for collaboration between politicians and outsiders on legislative and political issues involving only a weak nexus to any electoral campaign.” *Id.* (emphasis added). But the court held that “nothing in the FEC’s official explanation . . . satisfies APA standards.” *See id.* at 100.

The *Shays I* circuit court rejected the Commission’s argument that “limiting its standard to express advocacy and campaign redistribution outside the 120 days preserves space for political activities unrelated to elections.” *Id.* at 101. The court explained that, though the

Commission's regulation might achieve this goal, "so would regulating nothing at all, and that would hardly comport with the statute." *Id.* The court explained further:

Notwithstanding its obligation to attempt to avoid unnecessarily infringing on First Amendment interests, the Commission must establish, consistent with APA standards, that its rule rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition. The record before us, however, provides no assurance that the FEC's standard does not permit substantial coordinated expenditure, thus tossing out the proverbial baby (spending qualifying as contributions) with the bath water (political advocacy).

Id. at 101-02 (internal citations and quotation marks omitted).

Finally, the *Shays I* circuit court warned the Commission that "if it draws the line in the wrong place, its action will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration." *Id.* The court summarized its holding as follows:

[W]hile we accept the FEC's premise that time, place, and content may illuminate communicative purpose and thus distinguish FECA "expenditures" from other communications, we detect no support in the record for the specific content-based standard the Commission has promulgated. Accordingly, finding the rule arbitrary and capricious under the APA, we shall affirm the district court's invalidation.

Id.

IV. 2005 Rulemaking and *Shays III* Invalidation of Yet Another "Coordination" Rule.

In December 2005, "[t]o comply with the [*Shays I*] decision of the Court of Appeals, and to address other issues involving the coordinated communication rules," the Commission commenced another "coordination" rulemaking. NPRM 2005-28, 70 Fed. Reg. 73946 (Dec. 14, 2005). "Specifically," the Commission explained in NPRM 2005-28, "the Court of Appeals concluded that, by limiting 'coordinated communications' made outside of the 120-day window to communications containing express advocacy or the republication of campaign materials, 'the [Commission] has in effect allowed a coordinated communication free-for-all for much of each election cycle.'" *Id.* at 73948 (quoting *Shays I Appeal*, 414 F.3d at 100).

In March 2006, the Commission issued a Supplemental Notice of Proposed Rulemaking ("SNPRM") 2006-5, published at 71 Fed. Reg. 13306 (March 15, 2006), and invited comment on political advertising data licensed from CMAG, providing information regarding television advertising spots run by Presidential, Senate and House candidates during the 2004 election cycle.

The Commission in June 2006 published its revised rules on “coordinated communications,” which, *inter alia*:

- revised the fourth content standard at 11 C.F.R. § 109.21(c)(4) to establish separate time frames for communications referring to political parties, Congressional and Presidential candidates—shortening the time frames for Congressional candidates from 120 days to 90 days; and
- retained the express advocacy standard as the principal standard by which ads outside the time frames are regulated.

Final Rules and Explanation and Justification for Coordinated Communications, 71 Fed. Reg. 33190 (June 8, 2006).

Not surprisingly, the principal House sponsors of BCRA went back to court and once again challenged the coordination regulation in *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007) (“*Shays III District*”). The district court began by summarizing the history of the issue before it and the Commission’s chosen “time frames” approach, before turning to the question of whether the “weak restraints” applied outside the timeframes represented “reasoned decisionmaking.” *Id.* at 44. The court explained:

FECA provides that expenditures that are coordinated with a candidate constitute campaign contributions, 2 U.S.C. § 441(a)(7)(B)(i), and, in turn, defines an “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office,” *id.* § 431(9)(A)(i) (emphasis added). As the D.C. Circuit summarized, “if someone makes a purchase or gift with the purpose of influencing an election and does so in coordination with a candidate, FECA counts that payment as a campaign contribution.” *Shays I Appeal*, 414 F.3d at 97. The relevant goal, then, in designing regulations defining coordinated communication is to “capture the universe of electorally oriented communication.” *Id.* at 100; *cf.* 71 Fed. Reg. at 33,191 (“The purpose of the content prong is to ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a Federal election, and therefore are not expenditures subject to regulation under the Act.”) (internal quotation omitted).

Shays III District, 508 F. Supp. 2d at 44 (first emphasis in original, second emphasis added).

The court continued: “The FEC’s E&J, however, fails to provide any assurance that its revised content standards actually “capture the universe” of communications made for the purpose of influencing a federal election.” *Shays III District*, 508 F. Supp. 2d at 44. Not only did the *Shays III* district court find that the *National Journal* ads that we submitted to the Commission “provide irrefutable evidence that candidates produce advertisements outside the pre-election windows,” *id.*, but further found that “the evidentiary value of the *National Journal* articles is compounded by facts revealed by the FEC’s own analysis of the CMAG data[.] . . . It is clear from both the *National Journal* articles and the CMAG data that candidates spend money

on advertisements aired outside the pre-election windows.” *Shays III District*, 508 F. Supp. 2d at 45 (emphasis added) (quoting *Shays I Appeal*, 414 F.3d at 100).

The *Shays III* district court concluded that the “relevant inquiry” was whether the Commission “met its burden under the APA of establishing ‘that its rule rationally separates election-related advocacy from other activity falling outside FECA’s expenditure definition’” and the court held that the “Commission has simply failed to meet this burden.” *Id.* at 48-49 (quoting *Shays I Appeal*, 414 F.3d at 102).

The Commission appealed the *Shays III* district court decision invalidating, *inter alia*, the Commission’s revised “coordination” rules, but in June 2008, the D.C. Circuit issued its decision affirming the district court. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (“*Shays III Appeal*”). At the outset, the *Shays III* circuit court noted that in 2002 “Congress passed [BCRA] . . . in an effort to rid American politics of two perceived evils: the corrupting influence of large, unregulated donations called ‘soft money,’ and the use of ‘issue ads’ purportedly aimed at influencing people’s policy views but actually directed at swaying their views of candidates.” *Id.* at 916 (internal citation omitted) (emphasis added).

The *Shays III* circuit court recounted that, in *Shays I*, it had invalidated the Commission’s earlier “coordination” rule’s reliance on an express advocacy test outside of the 120-day pre-election time frame because “contrary to the APA, the Commission offered no persuasive justification for the provisions challenged . . . , i.e., the 120-day time-frame and the weak restraints applying outside of it.” *Id.* at 921 (quoting *Shays I Appeal*, 414 F.3d at 100). The court explained that it had remanded the rule and “directed the FEC to provide ‘some cogent explanation’ for it, ‘not least because’ it effectively ‘allowed a coordinated communication free-for-all for much of each election cycle.’” *Id.* (quoting *Shays I Appeal*, 414 F.3d at 100).

The *Shays III* circuit court found the record to reveal “that the vast majority of campaign ads omit ‘express advocacy.’” *Id.* at 924. Faced with the issue of whether the “FEC’s decision to regulate only ads containing express advocacy outside the 90/120-day windows fails *Chevron* step two review or violates the APA,” the court reasoned that the “question, then, is this: Does the challenged regulation frustrate Congress’s goal of ‘prohibiting soft money from being used in connection with federal elections?’” *Id.* at 924-25 (emphasis added) (quoting *McCormell*, 540 U.S. at 177 n.69). The *Shays III* circuit court concluded:

We think it does. Outside the 90/120-day windows, the regulation allows candidates to evade-almost completely-BCRA’s restrictions on the use of soft money. . . . [T]he FEC’s rule not only makes it eminently possible for soft money to be “used in connection with federal elections,” *McCormell*, 540 U.S. at 177 n. 69, 124 S.Ct. 619, but also provides a clear roadmap for doing so, directly frustrating BCRA’s purpose. Moreover, by allowing soft money a continuing role in the form of coordinated expenditures, the FEC’s proposed rule would lead to the exact perception and possibility of corruption Congress sought to stamp out in BCRA, for “expenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash,’” *id.* at 221, 124 S.Ct. 619 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446, 121 S.Ct. 2351, 150

L.Ed.2d 461 (2001)), and “[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude,” *id.* at 145, 124 S.Ct. 619.

Shays III Appeal, 528 F.3d at 925.

The *Shays III* circuit court explained:

Thus, “[n]otwithstanding its obligation to attempt to avoid unnecessarily infringing on First Amendment interests, the Commission must establish, consistent with APA standards, that its rule rationally separates election-related advocacy from other activity falling outside FECA’s expenditure definition,” which, remember, defines “expenditure” as “any purchase, payment, . . . or gift of money or anything of value, made by any person *for the purpose of influencing any election for Federal office.*” Here the Commission failed to show that its rule rationally separates election-related advocacy from other speech, for many of the ads its rule leaves unregulated are plainly intended to “influenc[e] an [] election for Federal office.” The FEC claims it has drawn a rational line because ads omitting magic words run by outside groups in coordination with candidates before the windows are generally not intended to influence federal elections. But this is absurd.

Id. at 925-26 (internal citations omitted) (emphasis in original).

In striking down the coordination rule, the *Shays III* circuit court noted with incredulity:

Finally, the FEC assures us that we have no reason to worry about lax regulation outside the 90/120-day windows because it has received very few complaints alleging that candidates are currently coordinating expenditures with outside groups before the windows, and there is no evidence that candidates will begin coordinating with outside groups if we uphold the regulation. This argument flies in the face of common sense. Of course the FEC hasn’t received many complaints: the challenged rule allows unlimited coordination so long as the resulting advertisements omit express advocacy. In other words, people have had no reason to report this type of coordination because it is perfectly legal under the FEC’s rule. Moreover, the Commission’s prediction about what will happen in the future disregards everything Congress, the Supreme Court, and this court have said about campaign finance regulation. In passing BCRA, Congress found that ads funded with soft money “were often actually coordinated with, and controlled by, the campaigns.” In *McConnell*, the Supreme Court said, “[m]oney, like water, will always find an outlet,” and BCRA reflects “the hard lesson of circumvention” Congress has learned from “the entire history of campaign finance regulation[.]” And in *Shays II*, we said, “if regulatory safe harbors permit what BCRA bans, we have no doubt that savvy campaign operators will exploit them to the hilt, reopening the very soft money floodgates BCRA aimed to close.” Common sense requires the same conclusion here. Under the present rules, any lawyer worth her

salt, if asked by an organization how to influence a federal candidate's election, would undoubtedly point to the possibility of coordinating pre-window expenditures. The FEC's claim that no one will take advantage of the enormous loophole it has created ignores both history and human nature.

Id. at 927-28 (internal citations omitted) (emphasis added).

V. Current "Coordination" Rules.

In October 2009, more than two years after the *Shays III District* decision, and some sixteen months after the *Shays III Appeal* decision, the Commission initiated its most recent "coordination" rulemaking to correct the rules declared illegal in those decisions. See NPRM 2009-23, 74 Fed. Reg. 53893 (Oct. 21, 2009).

To address the concern of the *Shays III* circuit court regarding election-related communications taking place outside the 90-day and 120-day windows, the Commission considered four approaches for the content standard outside the pre-election window:

- Adopting a content standard to cover public communications that promote, support, attack, or oppose a political party or a clearly identified federal candidate (the "PASO standard");
- Adopting a content standard to cover public communications that are the "functional equivalent of express advocacy," as articulated in *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007);
- Clarifying that the existing content standard includes express advocacy as defined under both 11 CFR § 100.22(a) and (b); and
- Adopting a standard that pairs a public communication content standard with a new conduct standard (the "Explicit Agreement" standard).

See NPRM 2009-23, 74 Fed. Reg. at 53897.

The Commission adopted a final coordination rule in September, 2010 augmenting its "functionally meaningless" express advocacy standard outside the 90-day and 120-day windows with the nearly-as functionally meaningless "functional equivalent" standard we objected to. Under the rule as amended last year, the content standards now include:

A public communication, as defined in 11 CFR 100.26, that is the functional equivalent of express advocacy. For purposes of this section, a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

11 C.F.R. § 109.21(c)(5); see also *Coordinated Communications, Final Rules and Explanation and Justification*, 75 Fed. Reg. 55947 (Sept. 15, 2010).